(12)

No. 91-1523

FILED
JUN 15 1993
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

October Term 1992

FLORENCE COUNTY SCHOOL DISTRICT FOUR, ERNEST K. NICHOLSON, SUPERINTENDENT, IN HIS OFFICIAL CAPACITY, AND SCHOOL BOARD MEMBERS BENNIE ANDERSON, MONROE FRIDAY, JACK ODOM,ELRITA BACOTE, T.R. GREEN, JAMES W. HICKS, IN THEIR OFFICIAL CAPACITY,

Petitioners,

v.

SHANNON CARTER, BY AND THROUGH HER FATHER AND NEXT FRIEND, EMORY CARTER,

Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL HEAD INJURY FOUNDATION, INC. AS AMICUS CURIAE IN SUPPORT OF RESPONDENTS

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QUESTION PRESENTED

Whether the parents or guardian of a child with a learning disability are entitled to state reimbursement under the Individuals with Disability Education Act ("IDEA") when they unilaterally place their child in a private school that does not meet state educational standards or in other respects satisfy the criteria of a "free appropriate public education" ("FAPE") which the state is required to provide under 20 U.S.C. §§1401(a)(18) and 1412(1) as a condition of receiving federal funding under the Act.

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BRIEF OF THE NATIONAL HEAD INJURY FOUNDATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICUS CURIAE*

The National Head Injury Foundation ("NHIF") is a national membership organization for people concerned with traumatic brain injury ("TBI"). Founded in 1980 by the mother of a young woman who had sustained traumatic brain injury, the NHIF is the only national,

non-profit membership organization dedicated solely to improving the quality of life for people with head injuries, as well as their families, friends and peers. Included among NHIF's many efforts is the promotion of head injury prevention, development of public policy, and encouragement of appropriate rehabilitation for head injury survivors.

This case demonstrates NHIF's interest in the issue before this Court because Shannon Carter arguably developed her learning disability as a result of traumatic brain injury to the head, as do many of NHIF's constituents. As the District Court below astutely noted:

> [A]ll of the experts who testified on the subject [of learning disabilities] were in agreement that, absent a traumatic injury to the head, a learning disability does not naturally develop in a child who previously did not suffer from one.

Carter v. Florence Cty. School Dist. Four, No. 4:86-2028-2 (D.S.C. Jan. 30, 1991)(Findings of Fact at f.n. 2).

More recently, on April 1, 1993, Senator Edward Kennedy introduced the Traumatic Brain Injury Act of 1993 (S. 725, 103rd Cong., 1st Sess. (1993)) from the floor of the United States Senate. Accompanying his introduction of this bill, Sen. Kennedy began his statement:

> Mr. President, today I am introducing legislation to assist the 2 million citizens who suffer traumatic head injuries each year from automobile collisions, bicycle falls, recreational accidents, assaults, and other tragic incidents.

> Each year 400,000 children suffer serious head injuries and approximately 100,000 people die, and a large number of those who survive require extensive hospitalization or suffer lifelong disabilities.

139 Cong. Rec. S.4291 (daily ed. April 1, 1993)(statement of Sen. Kennedy).

Under the Individuals with Disabilities Education Act, 20 U.S.C.A. §§1400 *et seq.* (West 1990 ed. & Supp. 1991)("IDEA" or "Act"), the term "children with disabilities" is defined to specifically include children with traumatic brain injury. 20 U.S.C. §1401(a)(1)(A). "Traumatic brain injury," in turn, is defined in part, as follows:

> (12) 'Traumatic brain injury' means an acquired injury to the brain caused by an external physical force, resulting in total or partial functional disability or psychosocial impairment or both, that adversely affects a child's educational performance....

57 Fed. Reg. 44, 801 (November 13, 1992) (to be codified at 34 C.F.R. §300.7).

Additionally, a recent report published by the Interagency Head Injury Task Force also recognized traumatic brain injury as the leading killer and cause of disability in children and young adults.[1] Educators also

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[1]Department of Health and Human Services. Interagency Head Injury Task Force Report (February 1989).

recognize that more than a million children and adolescents suffer traumatic brain injury in this nation every year.[2] The consequences of TBI are numerous. Physically, children with TBI often experience impairments of speech, vision, hearing and every form of paralysis. Cognitively, they may suffer from memory deficits, limited concentration, impaired perception and communication difficulties with reading, writing, planning and judgment. In addition to these physical and cognitive impairments, another consequence of TBI is the devastating financial impact on families of those who suffer this injury. Since the cost of providing services to children with TBI is often astronomical, many families of children with TBI are left facing near or total financial ruin.

Many of these children with TBI would not have survived their injuries had it not been for the advancements in medical technology over the past decade. As a result of such advancements, educators are now witnessing a new population of students with special needs entering or re-entering schools -- students with traumatic brain injuries. These school systems are the primary provider of long-term rehabilitation care for most children or adolescents who have sustained TBI.

Because of the high number of children and young adults affected by TBI, the considerable costs involved in educating children with TBI, as well as the significant role that school systems play in the rehabilitation of children with traumatic brain injury, the assurance of a

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[2] An Educator's Manual: What Educators Need to Know About Students with Traumatic Brain Injury. (R. C. Savage and G. F. Wolcott ed. 1988). at page II.

"free appropriate public education," as contemplated in IDEA, is of vital interest to NHIF. NHIF, as an advocacy organization for children with traumatic brain injuries, has a direct and immediate interest in protecting these children's right to a "free appropriate public education" under the Act, and is in a unique position to bring relevant matter to the Court's attention that has not yet been addressed by the other parties in this case. It is for these reasons that NHIF is now making an appearance as *amicus curiae*.[3]

STATEMENT OF THE CASE

A complete and accurate history of this litigation is found within the Circuit Court's opinion[4] below:

> This case involves the education of Shannon Carter.... Shannon attended the first grade at Timmonsville Elementary School of Florence County School District Four, in which she resided with her parents. Shannon attended a nearby private school, the Roy Hudgens Academy, through grade six. She re-entered the public school system for the seventh grade during the 1982-83 school year.
>
> Shannon performed poorly in school during the seventh grade. As a result, the school system tested her twice in early 1983 for potential

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[3] Letters of consent to the filing of this brief have been filed with the Clerk of the Court.

[4] Carter v. Florence Cty. School Dist. Four, 950 F.2d 156 (4th Cir. 1991).

learning disabilities. It concluded that, although Shannon scored slightly below average in achievement, she was not learning disabled. After Shannon performed badly during the first semester of the ninth grade, her parents prompted the school district to conduct additional testing in April 1985. Based on this testing, the school psychologist concluded that Shannon was indeed learning disabled under the criteria set forth by the South Carolina State Department of Education (SDE). Although the disability went unnoticed by the school district for almost three years, the district court found that it was comparatively severe.

Following the April 1985 evaluation, the school district proposed an individualized educational program (IEP) for Shannon at a meeting on May 1, 1985. (Footnote omitted.) Under the school district's proposal, Shannon would have remained in regular classes but would have spent at least two periods per day in the resource room. Shannon's parents objected to the proposed resource room placement, believing that it would be inappropriate to place Shannon alongside students with emotional illnesses and mental retardation. Instead her parents requested a learning disabilities itinerant program in which Shannon would receive individualized attention from a special education teacher. The adopted IEP, which became effective May 2, 1985, and was to run through June 1986, placed Shannon in an itinerant program for three periods per week of individualized instruction, with the remainder of

the week in regular classes. The IEP also contained specific goals for Shannon's educational progress. It set a goal of four months of reading progress during the school year, from a level of 5.4 (i.e., fifth grade, fourth month) to one of 5.8. The mathematics goal also posited four months' progress, from a 6.4 level to a 6.8 level. The IEP was implemented for the month remaining in the 1984-85 school year.

Dissatisfied with the IEP, Shannon's parents requested a due process hearing to challenge the appropriateness of the school district's educational program. *See* 20 U.S.C. §1415(b)(2) (1988); 34 C.F.R. §300.506(a) (1991). Both the local education agency hearing officer and the state education agency hearing officer rejected the arguments of Shannon's parents and concluded that the IEP provided Shannon with a free appropriate public education.

Because of their dissatisfaction with the school district's IEP, Shannon's parents placed her for the 1985-86 school year at the Trident Academy, in Mt. Pleasant, South Carolina, where she remained until graduation in 1988. Trident is a private school that enrolls only children with learning disabilities and specializes in the education of those whose learning disabilities are severe. Although Trident is accredited by the Southern Association of Colleges and Schools, approval of Shannon's placement at Trident had never been sought from the State Department of Education.

On previous occasions, however, Trident's enrollment included students sent there by public schools under the aegis of the Act, including three who were placed there by South Carolina public schools. There is no evidence that Trident Academy had ever been disapproved for placements under the Act by the SDE.

In July 1986, Shannon's parents filed suit on her behalf in the United States District Court for the District of South Carolina. The complaint alleged that the school district breached its statutory duty to provide Shannon a free appropriate public education and sought actual damages and 'retroactive reimbursement for tuition costs so far incurred.' After a bench trial, the district court found for Shannon. Although concluding that the school district had not breached the procedural requirements of the Act, it held that the school district violated the Act's substantive provisions by failing to provide Shannon with a free appropriate public education. The court concluded that the IEP's goals of a mere four months' progress in mathematics and reading allowed Shannon to 'continue to fall behind her classmates at an alarming rate' and therefore 'ensured the program's inadequacy from its inception.' The district court also found itinerant study of only three periods per week inadequate to 'allow her to receive passing marks and advance from grade to grade.'

Turning to the question of reimbursement, the district court held that 'Trident Academy

provided Shannon an excellent education in substantial compliance with all the substantive requirements of the (Act).' The court relied on the testimony of a court-appointed expert who tested Shannon and concluded that she made significant progress at Trident. For example, Shannon's reading comprehensive advanced from a level of 4.7 in 1985 to 7.8 in 1988 -- more than three years' progress over three school years. Moreover, the court concluded that '[n]othing in the existing law or regulations' barred reimbursement simply because the State Department of Education had not approved Shannon's placement by her parents at the Trident Academy. Thus, the district court ordered the school district to reimburse Shannon

> for tuition and fees, room and board, mileage to school, and four trips home per year for each of her three years at Trident ... plus prejudgment interest.

The school district appealed the judgment of the District Court to the Court of Appeals for the Fourth Circuit. The Court of Appeals affirmed the judgment of the District Court.

STATUTORY SCHEME AND SUMMARY OF ARGUMENT

This case presents a question of statutory interpretation only, **not** a question of public policy as suggested by several *amici curiae*. *See Hendrick Hudson Dist. Bd. of Educ. v. Rowley*, 458 U.S. 177 (1982); *and* Briefs of *Amici Curiae*, National League of Cities, et al., Argument II, page 21; The States of Arizona, et al., Argument II, at page 22; National School Boards

Association, et al., Argument III, page 27. By enacting IDEA (formerly the Education of the Handicapped Act) in 1975, Congress mandated this Nation's public policy dealing with the education of handicapped children (now referred to as "children with disabilities") as one assuring that **all** children with disabilities have available to them "a free appropriate public education" which emphasizes special education and related services designed to meet their unique needs. 20 U.S.C. §1400(c).

This Act's legislative history clearly establishes Congress' admirable vision to insure children with disabilities access to a free appropriate **public-supported** education designed to meet their unique needs, rather than to guarantee them any particular form of education once access is attained. Additionally, Congress sought to help states and localities provide for the education of all children with disabilities by offering financial assistance to states, in exchange for the states' agreement to comply with federally mandated standards and procedures. 20 U.S.C. §§1411-1415, 1420. To qualify for this federal financial assistance under IDEA, a state must demonstrate that it has "in effect a policy that assures all children with disabilities the right to a free appropriate public education." 20 U.S.C. §1412(1). This policy must be reflected in a state plan, approved by the Secretary of Education, that describes the goals, programs and timetables under which the state intends to educate children with disabilities within its jurisdiction. 20 U.S.C. §§1412, 1413.

Additionally, 20 U.S.C. §1412(5)(B) only requires private placements to meet state educational standards for children with disabilities whose needs cannot be met by their local educational agency, when the placement is

made by the state or local educational agency ("SEA/LEA"). Consistent with this statutory scheme, federal regulations regarding state educational standards only apply to private schools when the child is placed there by the SEA/LEA. *See* 34 C.F.R. §300.401. This scheme has no application to unilateral parental placements; it only applies to placements made by state and local school districts as part of their statutory obligation.

This Act, at §1415(e)(2), also gives federal courts the authority to grant appropriate relief, which relief includes "a broad grant of equitable power designed to provide courts maximum flexibility in effectuating the statutory objectives." *Doe v. Brookline School Committee*, 722 F.2d 910, 919 (1st Cir. 1983). Given the remedial nature of the Act, there is nothing within this section limiting the availability of appropriate financial relief to those parents placing their child in a private school which meets state education standards. To the contrary, financial relief is available even to those parents placing their child in a private facility that does **not** meet state education standards. As the Circuit Court below noted: "The Act itself simply imposes no requirement that the private school be approved by the state in parent-placement reimbursement cases," nor is there any indication to the contrary in the Act's legislative history. *Carter v. Florence Cty. School Dist. Four*, 950 F.2d 156, 162 (4th Cir. 1991).

ARGUMENT

I. THE LEGISLATIVE HISTORY BEHIND IDEA CLEARLY ESTABLISHES THAT BY ENACTING THIS ACT, CONGRESS INTENDED ITS

OVERRIDING PURPOSE AS ONE OF PUBLIC SUPPORT FOR SPECIAL EDUCATION AND RELATED SERVICES TO CHILDREN WITH DISABILITIES.

IDEA's "evolution and major provisions shed light on the question of statutory interpretation which is at the heart of this case." *Rowley*, 458 U.S. at 179. Contextually, at the heart of this evolutionary process is IDEA's legislative history. In 1975, when Congress had this Act under consideration, the Senate Subcommittee on the Handicapped heard extensive testimony at several on-site locations. Many of the states that have now appeared as *amici curiae* in the present case testified at those on-site hearings. The Senate Committee on Labor and Public Welfare, to which was referred the Senate version of this bill (S.6, 94th Cong., 1st Sess. (1975)), summarized the testimony as:

> The views presented in this testimony have been carefully reviewed and provide the basis for the changes made by the Committee in this legislation. These individuals and organizations were **generally unanimous** in their testimony on the following points: (1) support for the basic thrust of S.6; (2) recognition of the need for a final date in legislation by which time all handicapped children are to be provided a free appropriate public education; (3) **support for Federal assistance to assure that the rights of handicapped children are protected**; and (4) awareness of the need for expansion of Federal assistance and responsibility in the area of education for handicapped children. (Emphasis added.)

S. Rep. No. 168, 94th Cong., 1st Sess., page 7 (1975).

Now, before this Court come 17 individual states, the National League of Cities and the Council of State Governments, all protesting that the Circuit Court's opinion below "impermissibly encroaches on state and local authority over the education of children with disabilities" (Brief of *Amici Curiae* National League of Cities, et al., Argument II, page 21), and that it "impairs their ability to provide free appropriate public education as required by the IDEA." (Brief of *Amici Curiae* The States of Arizona, et al., Argument II, page 22.) Despite these protests, this Court has previously recognized in *Honig v. Doe*, 484 U.S. 305 (1988), at page 323, that:

> We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school.

Both the Senate and House Reports (S. Rep. No. 94-168, and H. Rep. No. 332, 94th Cong. 1st Sess. (1975)) recognized various court decisions in 27 states and the District of Columbia as shedding light on the need for federal involvement. *See* S. Rep. No. 94-168, page 6. Of particular interest to Congress was the case of *Mills v. Board of Educ. of D.C.*, 348 F. Supp. 866 (D.D.C. 1972). In its report, the Senate quoted portions of Judge Waddy's Memorandum Opinion, Judgment and Decree from *Mills*, as follows:

> The defendants are required by the Constitution of the United States, the District of Columbia Code and their own regulations to provide a

> publicly-supported education for these 'exceptional' children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds.... [T]he District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. (Emphasis added.)

Mills, id. at 876. *See also* S. Rep. No. 94-168, page 23; and 121 Cong. Rec. S.19485 (1975)(statement of Sen. Williams).

By employing the phrase "publicly-supported," Judge Waddy captured the spirit of the then yet to be enacted Education of the Handicapped Act, now known as IDEA; that is, the emphasis for appropriate education is premised upon **public-support** (i.e., financial), not exclusively upon public facilities nor necessarily even upon public standards. To implement his mandate, Judge Waddy ordered the school board, as one form of relief, to issue **public-supported** tuition grants at private schools if the Board could not supply the appropriate public education within its own system. *See Mills, id.* at 878.

The Senate Committee on Labor and Public Welfare mirrored Judge Waddy's mandate when it found that:

> Furthermore, while the Committee has provided that the State educational agency is to be the final responsible authority for assuring that all

> handicapped children have available to them free appropriate public education, it does not intend that State and local education agencies must be the sole providers of such services. (Emphasis added.)

S. Rep. No. 94-168, page 22.

This mandate was incorporated into the definition of "free appropriate public education" (FAPE) to include special education and related services that have been provided at "public expense" and "without charge." 20 U.S.C. §1401(a)(18)(A). Clearly, Congress intended to furnish children having disabilities a special education at public expense and without charge, with "the requirement that the education to which access is provided be sufficient to confer some educational benefit upon the child." *Rowley*, 458 U.S. at 200. Although the Act provides that FAPE meet the "standards of the state education agency" (20 U.S.C. §1401(a)(18)(B)), Congress nevertheless intended that the **substance** of the education override its **form**, except in the situation (not present here) where the school system makes the placement.

However, when the parents or guardian make the placement, emphasizing form over substance would often put them in the situation where they must resort to distant, even out-of-state, placements -- placements which should only be employed as a last resort when dealing with a child with a disability. From the outset, parents have available to them only a limited pool of educational facilities because many private schools are reluctant to accept children with disabilities. Private schools, even those that meet state standards, have no obligation to accept children with disabilities and

apparently, many of them refuse to accept these children. *See Antkowiak by Antkowiak v. Ambach*, 838 F. 2d 635 (2nd Cir. 1988) and *Diamond v. McKenzie*, 602 F. Supp. 632 (1985). If this Court were to accept petitioners' argument imposing the state standard burden upon parents who place their children in private schools, then the number of facilities available to them within their own community would be reduced even further.

A reduction in the number of available schools would necessarily result in placements that are not within the child's own community, indeed in many instances, even out-of-state. Community-based placements are more proper and should be sought because they promote the engendering of emotional support that parents can provide to their children with disabilities. This emotional support can only be obtained through close personal contact when the parent and child reside in close proximity to one another. However, this emotional support is lost in the distant placement.

In fact, the record in this case demonstrates that Shannon Carter's parents sought to avoid a distant placement of their daughter throughout her educational history. They first placed Shannon in an elementary school located in a neighboring county so that she could "'be with the children that she was with in [her] community, at church.'" Petition for Writ of Cert. to the U.S. Ct. of Apps. for the 4th Cir., page 5 (quoting JA48). Then, by placing Shannon at Trident Academy for her secondary education, her parents once again sought the closest available facility. *See* Petition for Writ of Cert., id. at 9. Adopting petitioners' argument would have required Shannon's parents to place her in a more distant

school. Clearly, Congress could not have intended such a result.

Furthermore, when the parents or guardian make the placement, emphasizing form over substance would often put them in the proverbial "Catch-22" where they must compromise the quality of their child's education for the sake of formal state standards that may have no relation to the appropriateness of the education. This case presents a perfect example of the problems that such misplaced emphasis would cause, because here, the petitioners do not contest the **appropriateness** of Shannon's education[5]. Instead, petitioners argue that Shannon's parents are not entitled to reimbursement solely because Trident Academy, the school that so appropriately educated her, did not meet all of the state's formal standards, even though other South Carolina public schools had previously placed children there. Indeed, no evidence was presented that the South Carolina Department of Education had ever disapproved any placements at Trident. *See Carter*, 950 F.2d at 159. Without question, if the parents or guardian make the placement, then Congress did not intend form to override substance when such a requirement adversely affects the one whom the Act seeks to protect--the child with a disability.

II. THE LEGISLATIVE HISTORY BEHIND IDEA, AS WELL AS THE LANGUAGE FOUND WITHIN THE ACT ITSELF, CLEARLY ESTABLISHES

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[5]As noted by the Circuit Court below, "the [petitioner] school district did not dispute the district court's conclusion that Trident Academy provided Shannon with an appropriate education...." Carter, 950 F.2d at 161 n.2.

THAT CONGRESS INTENDED A SECTION 1413(a)(4)(B) PLACEMENT TO MEET STATE STANDARDS ONLY WHEN THE PLACEMENT IS MADE BY PUBLIC SCHOOL AUTHORITIES, NOT WHEN THE PLACEMENT IS UNILATERALLY MADE BY THE PARENTS OR GUARDIAN OF THE CHILD WITH THE DISABILITY.

The District and Circuit courts below were presented with the narrow question of whether, after determining that petitioners failed to meet their statutory obligation under the Act to provide Shannon Carter with a "free appropriate public education," the Act required petitioners to reimburse respondents for the cost of Shannon's education in a private school unilaterally chosen by her parents that did not meet the standards of the State educational agency under Section 1401(a)(18)(B) of the Act, but that did provide Shannon with an appropriate education. In two well-reasoned opinions, the District and Circuit courts below addressed this argument by reconciling surface inconsistencies in language from a general section of the Act (20 U.S.C. §1401(a)(18)), with that of a specific section dealing with placement in private schools (20 U.S.C. §1413(a)(4)(B)), arriving at a result calculated to promote the legislative purpose behind the Act.

In dispelling petitioners' argument that reimbursement is proper only when the parents or guardian place their child in a private school approved by the state, the Circuit Court below properly found that the school district's position regarding Section 1413(a)(4)(B) would create "a significant and unwarranted restriction upon the ability of otherwise eligible children to seek

relief." *Carter*, 950 F.2d, at 163. This section requires that a state submit a plan to the Secretary of Education which shall set forth policies and procedures to assure that in private school placements, "if such children are placed in or referred to such schools or facilities by the State or appropriate local education agency ... in all such instances, the State educational agency shall determine whether such schools and facilities meet standards that apply to State and local educational agencies...." 20 U.S.C. §1413(a)(4)(B)(i) and (ii).

The Circuit Court below properly found that "Congress clearly envisioned that §1413(a)(4)(B), and its requirement that private schools receiving funds under the Act meet state educational standards, would apply only when the child is placed in the private school by the state or local school system." *Carter, id.* at 162. The Act imposes no such requirement when the child is so placed by the parents or guardian, nor does the Act's legislative history indicate that Congress ever intended to place these burdens upon the parents or guardian when they make the placement. Again, the legislative history provides:

> Thus, the bill requires that if a State or local educational agency has placed or referred the child to a private school or to another school or facility inside or outside of the State or local jurisdiction because the State or local educational agency did not have an appropriate program for the child, then the State or local educational agency remains financially responsible for that child's education.
>
> . . .

> Under the Committee bill a State's application shall provide that special education and related services shall be provided at no cost to the parents of a handicapped child.... It should be emphasized, however, that in no case should such charges result in cost to the parents or guardian, or the denial or diminution of services to the child.

S. Rep. No. 94-168, page 32.

The intent of Congress to place certain burdens only upon school authorities and not upon the parents or guardian of a child with a disability is evidenced in other sections of the Act as well. For example, portions of the Act mandate that the SEA/LEA educate children with disabilities in the least restrictive environment, which is often termed "mainstreaming." There is no such mandate for the parents or guardian. *See* 20 U.S.C. §1412(5)(B). In other areas, the Act requires the SEA/LEA to leave a child in a current educational placement during the pendency of procedural hearings under the Act, which is often referred to as a "stay-put" requirement. Again, there is no equivalent "stay-put" requirement imposed upon the parent or guardian. *See* 20 U.S.C. §1415(e)(3). *See also, Honig v. Doe*, 408 U.S. 305, 324 (1988). Congress clearly intended to impose more stringent requirements upon state agencies than upon parents and guardians under the terms of the Act, for the simple reason that the child with a disability needs more protection from the state than from his or her own parents or guardian.

This same intent of Congress to impose different burdens upon state agencies is also incorporated into the Secretary of Education's own regulations:

> Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:
> (a) Is provided special education and related services:
> (1) ...
> (3) at a school or facility which meets the standards that apply to State and local educational agencies.... (Emphasis added.)

34 C.F.R. §300.401(a)(3).

The Secretary's regulations impose no such obligation when the parent or guardian makes the placement. These mandates **only** apply to the SEA/LEA -- **not** to the parents or guardian. Similarly, the state standards provision of 20 U.S.C. §§1401(a)(18)(B) and 1413(a)(4)(B) should mandate only to the SEA/LEA -- not to the parents or guardian.

This language from the legislative history, from the Act itself, as well as that reflected in the Secretary's own regulations, clearly establishes Congress' intent to make the child (as well as the parents and guardian) the beneficiary of the Act, and to make the SEA/LEA the obligators. Congress did not intend "to impose on private schools chosen by parents the whole panoply of duties that the Act imposes on the state" *Carter, id.* at 163, simply because the threats that are present when the

government makes a private placement are not present when the parent or guardian makes such a placement.

III. WHEN STATE EDUCATION AUTHORITIES FAIL TO SATISFY THEIR STATUTORY OBLIGATION TO PROVIDE A CHILD WITH A DISABILITY AN APPROPRIATE EDUCATION, THE REMEDIAL LANGUAGE FOUND WITHIN SECTION 1415(e)(2) OF IDEA, WHICH CONFERS BROAD EQUITABLE AUTHORITY UPON COURTS TO GRANT APPROPRIATE RELIEF, CLEARLY ESTABLISHES CONGRESS' INTENT TO HAVE THE PARENTS OR GUARDIAN OF SUCH A CHILD REIMBURSED FOR THE COSTS OF A SPECIAL EDUCATION AND RELATED SERVICES IN A PRIVATE SCHOOL UNILATERALLY CHOSEN BY THEM, EVEN THOUGH THE PRIVATE SCHOOL DOES NOT MEET THE STANDARDS OF THE STATE EDUCATION AGENCY, BUT OTHERWISE ADDRESSES THE CHILD'S UNIQUE NEEDS AND PROVIDES THE CHILD WITH AN APPROPRIATE EDUCATION.

Congress also expressed its intent to maximize the benefits from "free appropriate public education" when it enacted 20 U.S.C. §1415(e)(2) of the Act. This section confers upon federal courts "a broad grant of equitable power designed to provide courts **maximum flexibility** in effectuating the statutory objectives." *Doe v. Brookline School Comm.*, 722 F.2d 910, 919 (1st Cir. 1983). (Emphasis added.) As this Court recognized in *Burlington School Comm. v. Massachusetts Dept. of Ed.*, 471 U.S. 359, 369 (1985): "[t]he ordinary meaning of these words confers broad discretion on the court." This express

language conferring broad equitable powers, combined with the overall remedial nature of the Act, grants broad discretion upon a court to fashion any remedy that is "compatible with sound and established equitable principles." *Hall v. Cole*, 412 U.S. 1, 12 (1973). *Also see Doe, id.* at 919. In the case of *California v. American Stores Co.*, 495 U.S. 271 (1990), this Court stated, at page 295:

> More recently, in *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982), we observed that when Congress endows the federal courts with equitable jurisdiction, Congress acts aware of this longstanding tradition of flexibility. "'Unless a statute in so many words, or by a necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied.'" *Ibid*, quoting *Porter v. Warner Holding Co.* 328 U.S. 395, 398 (1946).

Recognition and application of this Court's jurisdiction requires, therefore, the advancement of IDEA's purpose by **not** conditioning reimbursement upon state approval of the private school in a placement made by the parents or guardian when the state educational agency fails to meet its statutory obligation to provide the child with a disability an appropriate education. The Circuit Court below properly found that "[c]onditioning reimbursement under *Burlington* on state approval of the private school would undermine the values and policies the Act was enacted to further." *Carter*, 950 F.2d at 164. IDEA's purpose, as well as its values and policies, is "to assure that all children with disabilities have available to them ... a free appropriate public education which

emphasizes special education and related services designed to meet their unique needs...." 20 U.S.C. Section 1400(c).

When the parents or guardian of a child with a disability unilaterally place their child in a private school, then this Court's **proper placement** test developed in *Burlington* follows the **unique needs** language found at Section 1400(c) of the Act. The state standard requirement that petitioners argue does not. When school authorities fail to meet their statutory obligation to provide a child with a disability an appropriate education, and the parents or guardian must unilaterally place their children in private schools, then reimbursement should be premised upon recognizing the child's unique needs and proper placement -- not upon formal state standards which have failed the child in the first place. This Court in *Burlington* questioned "whether this grant of authority [in 20 U.S.C. §1415(e)(2)] includes the power to order school authorities to reimburse parents for their expenditures on private special education for a child if the court ultimately determines that such placement, rather than a proposed IEP, is proper under the Act." *Burlington, id.* at 369. In that case, this Court answered the question in the affirmative. Once again, this Court should answer the question affirmatively. Nothing in IDEA suggests an answer to the contrary.

CONCLUSION

In an ideal setting, IDEA generally provides that the primary source of special education for children with disabilities should be the public school authorities. However, when these authorities fall short of this ideal and fail to meet their statutory obligations to assure that

these children obtain a "free appropriate public education," then their parents or guardian are left with no alternative but to find an appropriate education through a proper placement in the private sector. This is the situation which confronted Shannon's parents.

In this situation, it is inconsistent with IDEA's purpose and its underlying values and policies, as well as the intent of Congress, to prohibit the parents from educating their child with a disability at a private school which provides an appropriate education merely because it does not satisfy the public school system's format -- the same format that initially placed the child in this precarious situation. Under these circumstances, satisfying state standards should not be made a prerequisite for a *Burlington* **proper placement.** Therefore, this *Amicus Curiae* respectfully asks that the Judgment of the Circuit Court below should be affirmed.

Respectfully submitted,

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